



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Sandhu & another v Jobita & another (Environment and Land Appeal
42 of 2019) [2023] KEELC 18009 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 42 OF 2019
SO OKONG'O, J
JUNE 15, 2023**

BETWEEN

BALBIS SINGH SANDHU 1ST APPELLANT

JAGPAL SINGH SANDHU 2ND APPELLANT

AND

LEONARD JOBITA 1ST RESPONDENT

NOAH JOSEPH OLWERO 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. Julius K. Ng'arung'ar
CM delivered on 3rd October 2019 in Kisumu CMCELC No. No. 252 of 2018)*

JUDGMENT

1. The Appellants sued the Respondents in the lower court seeking the following reliefs;
 - a. A permanent injunction restraining the Respondents whether by themselves or their servants or agents or otherwise howsoever, from interfering with the Appellants' proprietorship of all those parcels of land known as Title Nos. Kisumu/Nyalenda 'B'/2919, 598 and Kisumu/Nyalenda 'B'/2920, 596 (hereinafter referred to as "the suit properties").
 - b. An order allowing the Appellants to uproot the planted trees.
 - c. General damages for loss of mense (sic) rent.
 - d. Exemplary and/or punitive damages for the frustration of the Appellants.
 - e. Costs if the suit together with interest thereon at such rate and for such period of time as the court may deem fit to grant.
 - f. Any such other or further relief as the Honourable Court may deem appropriate.



2. The Appellants averred that at all material times to the lower court suit, they were the absolute registered proprietors of the suit properties. The Appellants averred that they were at all material times, lawfully and rightfully in possession of the suit properties. The Appellants averred that on diverse dates, the Respondents without any legal right entered and took possession of the suit properties and had thereafter planted trees on the suit properties for the purpose of undertaking an activity known as “Kisumu County Dunga Beach Wetland Conservation and Tree Planting Campaign” despite the fact that the suit properties were private property legally owned by the Appellants. The Appellants averred that the Respondents had wrongfully remained in possession of the suit properties.
3. The Respondents entered appearance and filed their statement of Defence dated June 6, 2018. The Respondents denied the averments contained in the plaint and put the Appellants to strict proof thereof. The Respondents averred that if there was indeed an activity known as “*Kisumu County Dunga Beach Wetland Conservation and Tree Planting Campaign*” the said activity was not being undertaken in the Appellants’ properties. The Respondents averred that the said activity was sanctioned by both Kisumu County Government and other National Government agencies.
4. The Respondents averred that if indeed there was any tree planting exercise being undertaken, the same was being undertaken under the auspices of Dunga Block Beach Wetland Self Help Group (hereinafter referred to only as “the group”). The Respondents averred that the said group sought the authority of the relevant state agencies dealing with environmental conservation around Lake Victoria Eco-system to undertake the exercise. The Respondents averred that the group dealt with conservation and preservation of wetlands and aquatic life including Hippos, Reptiles, Fish and endangered Sitatunga Antelopes grazing area around Lake Victoria eco-system.
5. The Respondents averred that all the activities of the said group of which they were bona fide members were usually undertaken after thorough public participation and endorsement by members of the surrounding community. The Respondents averred that the tree planting activity was undertaken by the group after consultation with the relevant government departments which duly confirmed that the land where the exercise was being undertaken was marked and gazetted as a Lake Reserve and was not private property belonging to the Appellants as they allege. The Respondents averred further that the latest edition of the map of the area dated May 2018 (78th Edition) indicated that the area on which the group planted the trees was a Lake Reserve Area. The Respondents averred that the tree planting exercise was endorsed by Josra Project and IPYF Kisumu which were stakeholders and partners of the group and land owners along the lake reserve area to ensure conservation of the lake eco-system. The Respondents prayed that the suit be dismissed with costs.
6. The Appellants had filed the suit together with a Notice of Motion Application for interlocutory injunction to restrain the Respondents from trespassing onto the suit properties. The Application was heard by the lower court and allowed as prayed on February 19, 2019.
7. On May 23, 2019, the lower court suit was referred to mediation by the court on its own motion and the parties duly notified through a notice dated June 6, 2019. The Appellants were aggrieved by the reference of the matter to mediation and filed a Notice of Motion Application dated July 30, 2019 seeking to vary the orders issued on May 23, 2019 and a direction that the matter proceeds to hearing of the main suit. The Appellants also prayed that the court does find that the Respondents were in contempt of court orders made on February 19, 2019 and be committed to civil jail for such period that the court deemed fit and just to impose. The Application was supported by the Affidavit of the 2nd Appellant sworn on July 30, 2019 in which he stated that the Respondents had taken advantage of the mediation order made on 23rd May 2019 to disobey the order of injunction that was made against them on February 19, 2019. The Respondents opposed the application through a Replying Affidavit



sworn by the 1st Respondent on August 23, 2019. The Respondents averred that the order referring the matter to mediation was made in open court in the presence of the parties and their advocates by the court on its own motion. The Respondents averred that the Appellants frustrated the mediation proceedings by failing to attend sessions before the mediator for various reasons. The Respondents denied that they had disobeyed the order made by the court on February 19, 2019.

8. In a ruling delivered on October 3, 2019, the lower court dismissed the Appellant's application and ordered the mediation proceedings to continue. The court held that since the matter had been referred to mediation, the issues raised in the application should have been raised in the mediation. The court held further that the application was filed prematurely. The Appellant was aggrieved with the said ruling and order and preferred this appeal. In their Memorandum of Appeal dated October 22, 2019, the Appellants challenged the lower court's ruling on the following grounds;
 1. The Learned Magistrate erred in law and in fact when he ordered the parties to revert to mediation yet the cause of action being trespass was not an issue whereby compromises could be negotiated.
 2. The Learned Magistrate erred in law and in fact when he ordered for mediation yet the Respondents were in contempt of court orders.
 3. The Learned Magistrate grossly misdirected himself in treating the evidence and submissions on contempt before him superficially and consequently coming to a wrong conclusion on the same.
 4. The Learned Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellants.
 5. The Learned Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellants.
 6. The Learned Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
9. The Appellants prayed that the appeal be allowed, the ruling of the learned magistrate be set aside and the matter be set down for hearing and determination of the main suit. Upon being served with the Memorandum of Appeal, the Respondents filed a Notice of Preliminary Objection on November 19, 2019. The Respondents contended that the appeal was defective and should be struck for having been filed without leave of the court.
10. The court gave directions that the appeal and the preliminary objection by the Respondents be heard together by way of written submissions. The Appellants filed their submissions on February 14, 2023 while the Respondents filed their submissions on February 28, 2013. The Appellants relied on Article 159(2)(b) of *the Constitution* and section 59 C of the *Civil Procedure Act* and submitted that alternative dispute resolution maybe undertaken either by consent of the parties concerned or upon the court's own initiative where the court is satisfied that a referral would be suitable. The Appellants submitted that in this case the matter was referred to mediation by the court suo moto and as much as the Appellants were willing to go the mediation way. The Appellants submitted that the Respondents displayed bad faith by defying court orders restraining them from trespassing onto the suit properties and on account of that, the Appellants intended to vitiate their approval for referral of the matter to alternative dispute resolution.
11. The Appellants cited the case of *Albert Mwaniki Kwenja & 2 Others v. Jernado Njoka Kwenja* [2020] eKLR where the court stated that credible alternative dispute resolution process should be



- voluntary and that alternative dispute resolution process should not be imposed on unwilling party. The Appellants submitted that blatant contempt and defiance of a court order by the Respondents ran contrary to this court's mandate to dispense justice thus there was no good cause for referring the matter to mediation since the matter was properly before the magistrate's court.
12. The Appellants submitted that the Respondents had continued with their acts of trespass on the Appellants' properties despite numerous injunctive orders by the lower court. The Appellants submitted that that was a blatant display of bad faith and disregard of the need to have the matter resolved. The Appellants submitted that it would not serve any useful purpose to insist on resolving the matter through mediation when it is clear that there had been no progress made in that regard. The Appellants submitted that the Respondents' hands were tainted and unclean which brought to doubt their commitment to having the matter resolved in a just and efficient manner. The Appellants urged the court to allow the appeal with costs.
 13. The Respondents submitted that pursuant to section 3A of the *Civil Procedure Act*, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The Respondents submitted that the court invoked its inherent power and directed the parties to try resolving the dispute through court annexed mediation which is duly provided for in the *Civil Procedure Act* under sections 59, 59A, 59B, 59C and 59D. The Respondents submitted that the court acted within its power to refer the matter to mediation. The Respondents submitted that the Appellants were not willing to comply with the court order on mediation. The Respondents submitted that the Appellants never attended the mediation sessions despite being served with summons to attend.
 14. On whether the appeal was defective for want of leave, the Respondents submitted that the appeal was filed in violation of section 75(1)(h) of the *Civil Procedure Act* as read with Order 43 Rule 1 (1), (2) and (3) of the *Civil Procedure Rules*. The Respondents submitted that a party must seek leave before filing an Appeal arising out of orders made under Order 46 Rule 20 as Order 46 is not among the orders listed under Order 43 as orders in respect of which appeals lie as of right. The Respondents submitted that no leave to appeal was sought by the Appellants before filing the Appeal herein and as such the Appeal is defective and should be struck out with costs.

Analysis and Determination:

15. I have considered the pleadings and proceedings of the lower court, the ruling of the lower court, the Memorandum of Appeal by the Appellants and the submissions by the advocates for the parties. The Appellants' grounds of appeal and the Respondents' preliminary objection raises the following three issues for determination by the court in this appeal namely; whether the appeal is competent, whether the lower court erred by failing to terminate the mediation proceedings and whether the appeal should be allowed. I will consider all these issues together.
16. On the issue of the competency of the appeal before the court, I find no merit in the preliminary objection by the Respondents. In their application dated July 30, 2019 before the lower court, the Appellants sought several reliefs and moved the court under several provisions of the law. The Appellants sought the review and setting aside of the order made on May 23, 2019 referring the matter to mediation. The Appellants also sought the committal of the Respondents to civil jail for contempt of court. The lower court refused to grant all the reliefs and dismissed the application. The dismissal of the Appellants' application could not therefore be said to have been made solely under Order 46 Rule 20 of the Civil Procedure Rules as claimed by the Respondents. Dismissal of applications to commit a party to civil jail for contempt under Order 40 Rule 3 of the *Civil Procedure Rules* and for a review



of an order under Order 45 of the Civil Procedure Rules gives rise to an automatic right of appeal. The Appellants did not, therefore, require leave to appeal as claimed by the Respondents.

17. On whether the lower court erred by failing to terminate the mediation proceedings, the following is my view: Alternative dispute resolution is underpinned in Article 159(2)(c) of the Constitution which provides as follows:

- “(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”

Section 59C of the Civil Procedure Act (Chapter 21 Laws of Kenya) provides as follows:

- “1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or where the court considers the case suitable for such referral.
- 2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves may agree to or as the court may, in its discretion order.”

18. Order 46 Rule 1 and 20 of the Civil Procedure Rules provides as follows:

- “1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgement is pronounced, apply to the court for an order of reference.

20.

- (1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.
- (2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.”

19. In Kenya Pipeline Company Limited v. Kenolkobil Limited [2013] eKLR the court stated as follows:

“I must point out that a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words “promote” and not “shall refer to” alternative dispute resolution.



Under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which deals with arbitration under an order of the court and other alternative dispute resolution, duty is bestowed upon the parties in a suit pending in court for determination to apply to have the matter referred to arbitration. The said Order stipulates as follows: -

Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

Order 46 Rule 20 (1) of the said Rules provides that: -

”Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) ...”

It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion, refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration suo moto, nothing would have been easier than for the drafters of the legislation to have explicitly stated so.

For the simple reason that arbitration is a consensual process, it therefore obtains that unless the parties in this matter consent to proceed for arbitration under Order 46 of the Civil Procedure Rules, 2010, they have no option but to submit themselves to the jurisdiction of this court until the very end of the proceedings.”

20. From the foregoing, the lower court had power to refer the lower court suit to mediation. That I believe is not contested in this appeal. What is contested is whether having referred the matter to mediation the court erred in refusing to terminate the mediation proceedings and bring the matter back to court for determination. I am of the view that a court retains jurisdiction over a matter referred to mediation and for good reason, a court can terminate mediation proceedings and proceed with the matter. The issue here is whether the Appellants had given good reason for the termination of the mediation proceedings. I am of the view that they had done so. The lower court was informed that the court had issued an injunction restraining the Respondents from trespassing on the suit properties and that as soon as the order referring the matter to mediation was made, the Respondents took advantage of the same and violated the said injunction order which violation was continuing. The Appellants urged the lower court to terminate the mediation proceedings and deal with the Respondents’ acts of contempt. The lower court had a duty to interrogate these issues that were raised by the Appellants. It did not do so. The lower court suggested that the issues of violation of the court order of injunction could be dealt with by the mediator. I am of the view that this was a misdirection. The mediator had no jurisdiction to deal with contempt of court and as such could not deal with the Appellant’s contempt application. I do not also understand what the lower court meant by stating that reference of the matter to mediation “in itself is an authentic injunction to the Defendants”. It is my finding that the Appellants had given sufficient reason for terminating the mediation proceedings so that the court could deal with the emerging issues and probably the case as a whole. The lower court erred in its finding that the Appellants’ application was premature. Reference of the matter to mediation did not suspend the jurisdiction of the court or the rights of the parties. The Appellants had every right to enforce compliance with the injunction order made in their favour on 19th February 2019. This could not be done while the matter was under mediation. Due to the foregoing, it is my finding that the lower court erred in dismissing the Appellant’s Application dated July 30, 2019.



Conclusion:

21. In conclusion, I find merit in the Appellant's appeal and no merit in the Respondent's Preliminary Objection. The Preliminary Objection is dismissed. The order made by the lower court on October 3, 2019 is set aside and substituted with an order allowing the Appellants' application in the lower court dated July 30, 2019 in terms of prayer 3 thereof. The lower court shall set down the matter for hearing of the main suit on a priority basis. Each party shall bear its costs of the appeal and of the lower court application.

DELIVERED AND DATED AT KISUMU ON THIS 15TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Owiti for the Appellant

Mr. Odhiambo for the Respondent

Ms. J. Omondi-Court Assistant

